Prepostal Prevention of Workplace Violence: Establishing an Ombuds Program as One Possible Solution

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On Christmas Eve 1997 in Denver, an ex-postal employee who had held seven people hostage at a regional mail center surrendered to police after a 9.5 hour ordeal.[1] The employee, forty-two year old David Lee Jackson, had been fired about eighteen months prior to this incident for threatening a supervisor.[2] Just one week earlier, Anthony Deculit, a mail handler in downtown Milwaukee, opened fire in a mail-sorting area.[3] Deculit, reportedly angry that his request to be transferred to the day shift was denied, killed a coworker he apparently disliked, seriously wounded a supervisor who had reprimanded him, and injured another worker caught in the line of fire.[4] Deculit then killed himself.[5]

These are just two of the latest in a series of well-published incidents of employee violence within the United States Postal Service (Postal Service).[6] In fact, postal worker violence has become so commonplace that the phrase "going postal" has become a part of pop-culture vernacular to describe erratic, irrational, and violent behavior.[7]

I. INTRODUCTION

Because of high-profile cases like these, any casual observer of the nightly news would not be surprised to learn that violence in the workplace

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[1] *See Latest Postal Incident Ends Peacefully After Standoff: Fired Employee Frees 7 After 9½-Hour Siege at Denver Facility*, CHI. TRIB., Dec. 25, 1997, § 1, at 3.

[2] *See id.*

[3] *See Danger Signs Preceded Postal Spree*, CHI. TRIB., Dec. 20, 1997, § 1, at 1.

[4] *See id.*

[5] *See id.*

[6] *See, e.g.*, Tom Pelton & Sharman Stein, *Postal Violence Hits Palatine Mail Center: Northlake Man, 53, Held in Shooting of 2 Fellow Employees*, CHI. TRIB., Aug. 30, 1995, § 1, at 1 (recounting another incident of postal worker violence); Kristin Downey Grimsley, *Postal Peace in Our Time? Management Has Programs to Defuse Tensions, but Labor Calls for More*, WASH. POST, Jan. 15, 1998, at C1.

[7] *See* Grimsley, *supra* note 6, at 1. This article mentions that there is even a video game called "Postal" in which players shoot at police, pedestrians, churchgoers, and a marching band. *See id.*

has become commonplace. In the United States, homicide is the second leading cause of death in the workplace.[8] For women, it is *the* leading cause of workplace fatality.[9] Each day in the workplace, criminal attacks result in death to three people and serious injury to an additional sixty-one people.[10] In fact, one out of every six violent crimes takes place in the workplace.[11]

Some statistics show that seventy-five percent of all criminal attacks in the workplace occur during the course of robberies and other crimes.[12] While these statistics appear to indicate that externally generated violence may be more prevalent, other research shows that violence among employees and by employees may be just as deserving of attention. In a survey conducted by the Society for Human Resources Management (SHRM), one-third of the respondents sampled indicated that their workplace had experienced a violent incident in the past five years.[13] Respondents to this survey reported that employee-to-employee violence accounted for 53.5% of such incidents.[14] Employee-to-supervisor violence accounted for 12.6% of the violent incidents reported.[15]

Although the research differs on what fraction of workplace violence is attributable to employees, prevention of this type of violence is most within the control of companies and management personnel. Likewise, violence between employees is perhaps the segment that may give rise to the greatest liability if employers do not take a proactive stance to prevent such violent occurrences. One possible solution to this problem is for companies to establish ombuds programs within their organizations to identify and prevent potentially explosive episodes in the workplace.

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[8] *See* Ann E. Phillips, Comment, *Violence in the Workplace: Reevaluating the Employer's Role*, 44 BUFF. L. REV. 139, 140 n.5 (1996) (citing *Justice Report on Workplace Violence Confirms Trend Already Noted by SHRM*, PR Newswire, July 24, 1994, *available in* LEXIS, News Library, Rrnews File.

[9] *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NO. 94-384, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES, 1993, at 1 (1994) [hereinafter CENSUS].

[10] *See* Phillips, *supra* note 8, at 140.

[11] *See id.*

[12] *See* CENSUS, *supra* note 9, at 1.

[13] *See* Society for Human Resource Management, *SHRM Survey Reveals Extent of Workplace Violence*, EAP DIG., Mar.-Apr. 1994, at 25. SHRM surveyed one thousand members and 479 responded. *See id.*

[14] *See id.*

[15] *See id.*

This Note will briefly explore the potential liability to employers when incidents of workplace violence occur. In addition, this Note will discuss the nature of an ombuds program. Finally, the ways in which an ombuds program can help to prevent internal workplace violence will be analyzed.

II. POTENTIAL EMPLOYER LIABILITY FOR INTERNAL WORKPLACE VIOLENCE

Presently, ninety percent of the American workforce is covered by a compulsory workers' compensation system.[16] A typical state workers' compensation statute guarantees partial compensation to an employee, regardless of fault, who is injured "in the course of" or "arising out of" employment.[17]

The very essence of the workers' compensation system is that employees give up their common-law rights to sue their employers in exchange for timely, scheduled payments for injuries that occur on the job.[18] Therefore, workers' compensation statutes are widely understood as providing the exclusive remedy for injuries arising out of an individual's employment.[19] However, courts across the country have carved out exceptions to this exclusivity requirement by incorporating a dual persona doctrine[20] and an intentional tort exception into the analysis of workers'

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[16] *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 330-331 (1997). Workers' compensation is compulsory in all but New Jersey, South Carolina, and Texas. One group of scholars notes that "even in states where [workers' compensation] is elective, most employers choose to be covered to receive limited liability." Barry T. Hirsch et al., *Workers' Compensation Recipiency in Union and Nonunion Workplaces*, 50 INDUS. & LAB. REL. REV. 213, 213-214 (1997).

[17] *See* JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 780 (4th ed. 1994). For a thorough discussion of the nature and applicability of workers' compensation laws, see ARTHUR LARSON ET AL., 1 LARSON'S WORKERS' COMPENSATION LAW §§ 1-14 (1997).

[18] *See* LARSON ET AL., *supra* note 17, § 1.10 (stating that "the employee and his or her dependents, in exchange for these modest but assured benefits, give up their common-law right to sue the employer for damages for any injury covered by the act"); Phillips, *supra* note 8, at 150.

[19] *See, e.g.*, Downer v. Detroit Receiving Hosp., 477 N.W.2d 146, 148 (Mich. Ct. App. 1991) (deciding that a negligent hiring claim against the employer was barred by the exclusive remedy requirements of Michigan's Workers' Compensation Act).

[20] *See* LARSON ET AL., *supra* note 17, § 72.81. "An employer may become a third person, vulnerable to tort suit by an employee, if—and only if—he possesses a second persona so completely independent from and unrelated to his status as employer . . . that the law recognizes [the employer] as a separate legal person." *Id.*

compensation claims.[21] An intentional tort theory is applicable when the nature of the injury does not arise "by accident" within the employment setting.[22] Liability of employers for the actions of third parties arises when the employer does not act to prevent or eliminate a known threat.[23] Once the intentional tort exception is invoked, an injured employee is able to proceed under a variety of common-law theories,[24] including voluntary assumption of a duty to protect, negligent hiring, negligent retention, and negligent supervision.

A. *Voluntary Assumption Theory*

An employer's duty to protect employees from the criminal acts of third parties arises from the employer's express or implied promise to provide a safe and secure work environment.[25] Once an employer is found to have

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The dual persona doctrine is not relevant to the remaining parts of this Note because courts have only applied the doctrine in narrow situations where the employer had a completely and distinctly, separate relationship with the employee that was outside the scope of the normal workplace environment. *See generally id.* §§ 72.82–72.89 (providing examples of the circumstances in which the dual persona doctrine has been applied and rejected).

[21] *See, e.g.*, Shutters v. Domino's Pizza, Inc., 795 S.W.2d 800, 803 (Tex. App. 1990, no writ); *see also* Phillips, *supra* note 8, at 151 (discussing the growth of judicially recognized exceptions to the exclusivity requirements of workers' compensation statutes); *cf.* Acevedo v. Consolidated Edison Co., 572 N.Y.S.2d 1015, 1017–1018 (N.Y. Sup. Ct. 1990) (determining that claimant's intentional tort theory claim must fail because the facts did not support more than gross or reckless conduct by the employer).

[22] *See* David C. Minneman, Annotation, *Workers' Compensation Law as Precluding Employee's Suit Against Employer for Third Person's Criminal Attack*, 49 A.L.R.4th 926, 932 (1986) (explaining the rationale for recognizing intentional tort exceptions within workers' compensation laws).

[23] *See id.*

[24] *See* LARSON ET AL., *supra* note 17, § 68.00.

[25] This duty is analogous to the one imposed on landlords. *See* B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 695–699 (1992) (discussing the duty of landlords to provide security and the surrounding case law). The application of the landlord's duty to provide a safe environment in the workplace becomes apparent when one considers that it has long been recognized that there is a duty of a business to furnish employees of an independent contractor with a safe workplace. This duty, often referred to as the "safe workplace doctrine" when applied to a contractor's employees, is closely related to the duty of a landowner. *See, e.g.*, Rowley v. Mayor of Baltimore, 505 A.2d 494, 499 (Md. 1986) (discussing the safe

assumed a duty to provide security, the employer is bound to exercise this duty with reasonable care. Failure to do so creates liability if harm arises.[26]

The voluntary assumption theory is illustrated by *Slager v. Commonwealth Edison Co.*[27] In this case a wrongful death action was brought against Commonwealth Edison after an employee was killed on company property during a wildcat strike.[28] Following his workday, the employee attempted to leave the premises and was struck, while in his vehicle, with a picket sign.[29] Panicked, the employee accelerated into the path of an oncoming truck and was killed instantly.[30] The court held that the company's assumption of duty to provide the decedent with a safe workplace arose from the company's express statements, actions, and intent to provide security for the workers during the wildcat strike.[31]

In *Vaughn v. Granite City Steel Division of National Steel Corp.*,[32] another Illinois appellate case, the court turned to a company manual to determine that the company made an affirmative undertaking to protect employees while on the premises.[33] In *Vaughn* an employee was the victim of a late-night homicide in the employer's parking lot while on his way into work.[34] The court found in favor of the decedent's estate holding that the employer owed a duty to its employees to provide adequate security in the parking lot.[35]

Cases like these demonstrate that courts are willing to go beyond the exclusive remedy of workers' compensation to impose liability on employers when the employers have taken steps to ensure the safety of their employees. However, the courts have not articulated a bright-line test to determine when such an affirmative undertaking has taken place. As such, potential liability for even well-meaning employers is great.

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workplace doctrine).

[26] *See* RESTATEMENT (SECOND) OF TORTS § 324A (1965).

[27] 595 N.E.2d 1097 (Ill. App. Ct. 1992).

[28] *See id.* at 1098. A wildcat strike is one that is not authorized by the strikers' collective bargaining representative. *See* 48A AM. JUR. 2D *Labor and Labor Relations* § 3547 (1994).

[29] *See Slager*, 595 N.E.2d at 1100.

[30] *See id.*

[31] *See id.* at 1104.

[32] 576 N.E.2d 874 (Ill. App. Ct. 1991).

[33] *See id.* at 879.

[34] *See id.* at 876.

[35] *See id.* at 878.

B. *Negligent Hiring*

Negligent hiring and negligent retention are "often litigated together as issues, are frequently treated together in the reported cases, and discussed together in the periodical and treatise literature."[36] However, there are some key differences between the two theories, and for that reason they will be discussed independently.

A claim for negligent hiring arises when an employer fails to exercise ordinary care in its hiring practices.[37] In order to prevail on a negligent hiring theory, an injury victim must establish that there was an employment relationship between the entity being sued and the wrongdoer,[38] that the accused committed a tortious act,[39] that the negligent hiring was a proximate cause of the harm done by the employee-wrongdoer,[40] and that the employer knew or should have known that the employee was potentially dangerous.[41]

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[36] STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 4:8, at 571 (1983); *see also* Plains Resources, Inc. v. Gable, 682 P.2d 653, 662 (Kan. 1984) (discussing the elements of "negligent hiring and/or retention doctrine").

[37] *See, e.g.*, Svacek v. Shelley, 359 P.2d 127 (Alaska 1961); Murray v. Modoc State Bank, 313 P.2d 304 (Kan. 1957); Haskell v. Boston Dist. Messenger Co., 76 N.E. 215 (Mass. 1906); F & T Co. v. Woods, 594 P.2d 745 (N.M. 1979); Dempsey v. Walso Bureau, Inc., 246 A.2d 418 (Pa. 1968); Wishbone v. Yellow Cab Co., 97 S.W.2d 452 (Tenn. 1936). For an in-depth discussion of the negligent hiring theory of employer liability, see John C. North, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 CHI.-KENT L. REV. 717 (1977).

[38] This is a fundamental, foundational requirement. *See* RESTATEMENT (SECOND) OF AGENCY § 213 (1958).

[39] *See, e.g.*, Illinois Cent. R.R. Co. v. O'Neill, 177 F. 328, 331 (5th Cir. 1910); Lange v. B & P Motor Express, Inc., 257 F. Supp. 319, 324 (N.D. Ind. 1966); Sloss-Sheffield Steel & Iron Co. v. Bibb, 51 So. 345, 348 (Ala. 1910); Texas Skaags, Inc. v. Joannides, 372 So. 2d 985, 986 (Fla. Dist. Ct. App. 1979); Broadstreet v. Hall, 80 N.E. 145, 146 (Ind. 1907); Johnson v. Lamb, 161 S.E.2d 131, 137 (N.C. 1968).

[40] *See, e.g.*, Strauss v. Hotel Continental Co., 610 S.W.2d 109, 114–115 (Mo. Ct. App. 1980) (holding that even where there is a duty to investigate, failure to do so would not create liability for the employer when the employee had an undisclosed criminal record and the event that took place was unforeseeable to the employer).

[41] *See, e.g.*, Evans v. Morsell, 395 A.2d 480, 483 (Md. 1978) (affirming a grant of directed verdict for a tavern owner alleged to be liable for the negligent hiring of a bartender who shot a patron and had an unrevealed history of past criminal assaults many years prior that were undiscovered by the tavern owner because the owner had made no inquiry; the wrongdoer had worked for the owner for 18 months without incident and was reported as being a "good worker" and "honest").

Case law reveals that most negligent hiring claims turn on the issues of duty and foreseeability.[42] When an employer fails to conduct a reasonable search of an employee's background, the employer has breached its duty of care.[43] Foreseeability is established when the plaintiff demonstrates that the employer knew or should have known that some injury might occur.[44]

Courts have not reached any kind of consensus when it comes to determining what amounts to a reasonably sufficient background investigation. Courts have clearly indicated that some minimal level of investigation is required.[45] Likewise, courts have held that extensive, in-

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[42] *See* Charles A. Odewahn & Darryl L. Webb, *Negligent Hiring and Discrimination: An Employer's Dilemma?*, 1989 LAB. L.J. 705, 707-709 (providing a thorough discussion of duty and foreseeability).

[43] *See id.* at 708

> An integral part of the duty owed by the employer is the duty to conduct a reasonable and adequate investigation of an employee prior to hiring. The scope of an employer's pre-selection investigation is related to the degree of risk a potential employee poses to the third party. This aspect of the employer's duty is usually the focal point of negligent hiring cases.

Id.

[44] *See id.* at 708-709. With regard to this key factor for determining an employer's liability for negligent hiring,

> [t]he plaintiff must prove a causal connection (proximate cause) between the harm sustained and the negligence of the employer. This standard requires the plaintiff to prove that his or her injuries were caused by that attribute of the employee that the employer knew or should have known was likely to cause harm. Courts have held that in order to establish the necessary causal connection the plaintiff must prove the injuries were a logical consequence of a specific act of negligence or intentional act by the employee and that this act was a natural and logical consequence of the employee's incompetence that was known, either actually or constructively, by the employer. Many courts approach this by looking at the likelihood (foreseeability) of the injury. If the plaintiff's injury could not be reasonably foreseen by the employer at the time of the hiring, the employer's conduct will not be considered the proximate cause of the injury. Therefore, the standard of proximate cause requires the plaintiff's injury to be the natural, probable, and foreseeable result of the employer's negligence.

Id. (footnotes omitted).

[45] *See, e.g.*, Hipp v. Hospital Auth. of Marietta, 121 S.E.2d 273, 275 (Ga. Ct. App. 1961) (holding that employer is chargeable with knowledge obtained from a reasonable investigation); Weiss v. Furniture in the Raw, 306 N.Y.S.2d 253, 255 (N.Y. Civ. Ct. 1969) (determining that the employer's failure to conduct any sort of investigation at all was a breach of duty); Estate of Arrington v. Fields, 578 S.W.2d 173, 178 (Tex. Civ. App. 1979, writ ref'd n.r.e.) (holding employer accountable for information that could have been secured with a reasonable investigation); *see also*

depth investigation is not required.[46] Yet, even within these parameters, identifying what is negligent behavior is difficult, as the two cases that are discussed below illustrate.

In *Senger v. United States*,[47] a Ninth Circuit decision, a tow truck driver brought an action against the government under the Federal Tort Claims Act[48] after he was assaulted by a Postal Service worker.[49] The Postal Service was not aware of all of the postal worker's prior violent incidents that were listed in the supporting affidavits submitted by the plaintiff, yet the court held that the driver presented enough facts to create a genuine issue of fact concerning the foreseeability of the assault.[50] As a result, the court held that the district court erred by granting summary judgment in favor of the defendant.[51]

In another case, *Doe v. WTMJ, Inc.*,[52] a radio listener who was a minor sued a radio station after a station employee pled guilty to charges of kidnapping and molestation.[53] The radio employee had engaged in sexually explicit conversations with the plaintiff on the station's request line and had taken the plaintiff to a motel to engage in oral sex and sexual intercourse.[54] Prior to these events, the employer radio station was aware that the announcer had previously been fired for insubordination, but failed to conduct a background search that would reveal any criminal or civil improprieties.[55] The court determined that in spite of the employer's lack of

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North, *supra* note 37, at 726–727.

[46] *See, e.g.*, Stevens v. Lankard, 297 N.Y.S.2d 686, 688 (N.Y. App. Div. 1968) (holding that a routine investigation would not have revealed store clerk's criminal conviction). However, the nature of the employment is likely to dictate the level of care required. *See, e.g.*, Easley v. Apollo Detective Agency, Inc., 387 N.E.2d 1241, 1249 (Ill. App. Ct. 1979) (holding the employer liable for unrevealed prior arrests of a security guard, the court stated that "in the selection of an agent, an employer will be held to the exercise of care reasonably commensurate with the perils and hazards likely to be encountered in the performance of the agent's duty").

[47] 103 F.3d 1437 (9th Cir. 1996).

[48] 28 U.S.C. § 2860(h) (1994).

[49] *See Senger*, 103 F.3d at 1438–1439.

[50] *See id.* at 1440–1443.

[51] *See id.* at 1444.

[52] 927 F. Supp. 1428 (D. Kan. 1996).

[53] *See id.* at 1430.

[54] *See id.* at 1432.

[55] *See id.* at 1431. In fact, had the station conducted such a background investigation it would have discovered numerous legal proceedings to which the employee was subject, including a protective order against him by a former live-in

even a minimal background check, the defendant did not have reason to know "that [the announcer] had a dangerous proclivity to kidnap and molest someone."[56]

The inconsistency of these two opinions illustrates the difficulty of knowing what amounts to negligent hiring. In addition, there are many other concerns that limit an employer's ability to investigate thoroughly a potential employee's history prior to making hiring decisions. Namely, excluding people based on pre-employment background checks may implicate a number of federal statutes. For instance, an employer who considers arrest and conviction records may be in violation of Title VII of the Civil Rights Act of 1964 (Title VII).[57] National crime statistics show that some minority groups are arrested and convicted with greater frequency than their presence in the population.[58] Therefore, employers who use this data may possibly be in violation of Title VII because of the disparate impact that such background checks would have on minorities.[59] In addition, a perception of violence-prone behavior may be related to a disability that is protected under the Americans with Disabilities Act (ADA).[60] Finally, excluding current or former members of the armed

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girlfriend alleging the employee had made approximately 50 disturbing phone calls to her and stating that she feared that he would hurt her. *See id.*

[56] *Id.* at 1433.

[57] 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. II 1996).

[58] *Compare* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 18 tbl.18 (1997) *with* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *supra*, at 209 tbl.328.

[59] *See, e.g.*, Green v. Missouri Pacific R.R. Co., 523 F.2d 1290, 1296 (8th Cir. 1975) (holding that the employer's use of criminal records was in violation of Title VII because of the disparate impact on minorities); Gregory v. Litton Sys., Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970), *modified on other grounds*, 472 F.2d 631, 632 (9th Cir. 1972) (holding that the employer's use of arrest records was in violation of Title VII because of the disparate impact on minorities).

[60] 42 U.S.C. §§ 12101–12213 (1994 & Supp. II 1996). For a thorough discussion of the ADA as it relates to violent behavior in the workplace, see John D. Thompson, *Psychiatric Disorders, Workplace Violence and the Americans with Disabilities Act*, 19 HAMLINE L. REV. 25 (1995). Employers are most likely to be found in violation of the ADA when they refuse to hire or retain an employee who is perceived to have a mental disorder that causes them to act violently or when the employer overreacts and perceives an actual disability as an indication of violence. *See id.* at 43; *see also* Hindman v. GTE Data Servs., Inc., 3 Am. Disabilities Cas. (BNA) 641, 645 (M.D. Fla. June 14, 1994) (denying the employer's motion for summary judgment because an issue of fact existed as to employment discrimination under the ADA when the company dismissed an employee with a chemical imbalance who brought a firearm to

forces could violate the Veterans Reemployment Rights Act of 1994 (VRRA)[61] and the Vietnam Veterans Readjustment Assistance Act of 1974.[62] Nevertheless, employers are being held liable for hiring those whose pasts indicate a propensity toward violence.

C. *Negligent Retention and Supervision Theories*

In addition to the liability that arises under the negligent hiring theory, employers may also be held liable for tortious acts of an employee under a theory of negligent retention when the employer has knowledge of the employee's past such that tortious behavior would be foreseeable.[63] The key difference between negligent hiring and negligent retention is that the employer does not become aware of the employee's history until after the individual is hired.[64] To avoid liability, employers must immediately respond with appropriate precautions against future harm once the employer becomes aware of information that indicates a potentially dangerous situation.[65] This requirement can be especially burdensome for employers.

In *Yunker v. Honeywell, Inc.*[66] a custodian, incarcerated for strangling a coworker, was rehired after he had been released from prison.[67] He eventually killed another female coworker in her driveway,[68] after scratching a death threat on her locker door at work several days prior to this.[69] The court reversed a summary judgment granted by the trial court, reasoning that the employer's knowledge of the employee's work and

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work and alleged that his poor judgment stemmed from his disability).

[61] 38 U.S.C.A. §§ 4301–4333 (West Supp. 1998). One court has declared that the purpose of the VRRA is to protect the rights of reservists against employment discrimination that is motivated solely by reserve status. *See* Novak v. Mackintosh, 919 F. Supp. 870, 876–879 (D.S.D. 1996).

[62] 38 U.S.C. §§ 4211–4214 (1994 & Supp. II 1996).

[63] *See* Ferdinand S. Tinio, Annotation, *Employer's Knowledge of Employee's Past Criminal Record as Affecting Liability for Employee's Tortious Conduct*, 48 A.L.R.3d 359, 361 (1973).

[64] *See* SPEISER ET AL., *supra* note 36, § 4:9, at 580–581.

[65] *See id.*

[66] 496 N.W.2d 419 (Minn. Ct. App. 1993).

[67] *See id.* at 421.

[68] *See id.*

[69] *See id.*

criminal history made the fatal attack against his female coworker foreseeable.[70]

In *Haddock v. City of New York*[71] a municipality was held liable for the rape of a child in a public park, committed by a city employee who had a substantial criminal record.[72] The court held that the city failed to act appropriately when it learned of the employee's criminal history.[73]

Employers who have only constructive knowledge of an employee's tendency toward violence have also been held liable for the actions of the employee. An illustrative case is *Pittard v. Four Seasons Motor Inn, Inc.*[74] In *Pittard* the court determined that an employer's knowledge of an employee's alcoholism and tendency toward violence presented sufficient evidence for a jury determination on the injured employee's negligent retention claim.[75]

Negligent supervision, like negligent hiring and negligent retention, requires the injured employee to establish that the employer had knowledge of the employee's violent tendencies and failed to adequately supervise the employee.[76] To avoid liability, an employer must take reasonable care to supervise its employees while they are acting as agents of the employer.[77] This theory, although more limited in its use, has shown up in the courts.[78]

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[70] *See id.* at 424.

[71] 553 N.E.2d 987 (N.Y. 1990).

[72] *See id.* at 988-989.

[73] *See id.* at 991.

[74] 688 P.2d 333 (N.M. Ct. App. 1984).

[75] *See id.* at 341.

[76] *See* RESTATEMENT (SECOND) OF AGENCY § 213 (1958) (stating that "[a] person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the supervision of the activity"). For courts that have recognized the tort of negligent supervision, see *International Distrib. Corp. v. American Dist. Tel. Co.*, 569 F.2d 136 (D.C. Cir. 1977); *Murphy v. Army Distaff Found., Inc.*, 458 A.2d 61 (D.C. 1983); *Dempsey v. Walso Bureau, Inc.*, 246 A.2d 418 (Pa. 1968); *Welsh Mfg., Div. of Textron, Inc. v. Pinkerton's, Inc.*, 474 A.2d 436 (R.I. 1984).

[77] *See, e.g.*, Moses v. Diocese of Colo., 863 P.2d 310, 329 (Colo. 1993) (holding that "an employer may therefore be subject to liability for negligent supervision if he knows or should have known that an 'employee's conduct would subject third parties to an unreasonable risk of harm'") (quoting Destefano v. Grabrian, 763 P.2d 275, 288 (Colo. 1988)). In *Moses* a negligent supervision claim was brought against the Diocese after a priest committed sexual improprieties during a counseling session with a parishioner. *See id.* at 310-311. The court, ruling against the Diocese in the negligent supervision claim, stated that the Diocese was in possession of information that put it on notice and that the Diocese should have assumed a greater degree of care in

Like negligent hiring, negligent retention and negligent supervision of employees whose pasts can be construed to indicate future tendencies toward violence may lead to liability on the part of employers. Employers are charged with investigating the backgrounds of their employees and taking proactive and remedial measures to prevent violence in the workplace. At the same time, employers must remain mindful of federal legislation designed to protect the rights of particular individuals or groups of individuals.[79]

III. AN OMBUDS PROGRAM EXPLAINED

Aside from screening employees, administering tests, doing background checks, and maintaining a watchful eye over employees, companies may benefit from establishing an ombuds program.[80] An ombuds program offers another solution to the prevention of workplace violence and the resolution of disputes and misunderstandings that may lead to workplace violence among employees and supervisors. In addition, an ombuds program may go a long way toward limiting an employer's liability should violence occur.

An ombuds has been defined as a person who is typically a third-party fact-finder or adjuster who is salaried, yet remains neutral; has been selected to investigate grievances and complaints from an institution's constituents, employees, or clients; makes nonbinding recommendations to management on resolving disputes; functions in a voluntary, private, and informal setting; and has a duty to justice and equity for all of the parties involved.[81] Although the ombuds model of alternative dispute resolution has enjoyed a recent surge of interest, the ombuds model is a very old concept that can be traced back to ancient times when Egyptian rulers utilized complaint officers in their courts.[82] However, it was not until the

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monitoring the priest's conduct. *See id.* at 329.

[78] *See* cases cited *supra* note 76.

[79] *See supra* notes 57–62 and accompanying text.

[80] "Ombuds" is used throughout this article in lieu of "ombudsman" or "ombudsperson" so that the language is gender neutral and less cumbersome. However, it should be noted that ombudsman is the more commonly accepted variation. *See generally* Mary P. Rowe, *The Corporate Ombudsman: An Overview and Analysis*, 3 NEGOTIATION J. 127 (1987).

[81] *See* Tom Arnold, *Vocabulary of Alternative Dispute Procedures*, 50 DISP. RESOL. J., Oct.–Dec. 1995, at 69, 71.

[82] *See* Shirley A. Wiegand, *A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model*, 12 OHIO ST. J. ON DISP. RESOL. 95, 97 (1996) (providing a thorough discussion of the historical roots of the ombuds model).

turn of the nineteenth century that the form, widely used in government today, originated in Sweden.[83]

Moreover, it was not until just thirty years ago that the governmental ombuds concept was adapted and envisioned to embody a means by which American corporations could promote justice and corporate accountability.[84] Today, while not yet commonplace, the ombuds concept is firmly rooted in America. For instance, the Administrative Conference of the United States issued a recommendation in June 1990 that all federal agencies that deal significantly with the public consider establishing ombuds offices.[85] In addition, the ombuds model is becoming more and more common in American corporate culture.[86] Such well-known companies as Federal Express, IBM, McDonald's, and Control Data have incorporated this preventative tool into their corporate structure as a means of resolving employee disputes.[87]

A corporate ombuds office may be established to deal with a myriad of problems, complaints, and grievances from within and outside of the organization.[88] Regardless of the primary purpose of the ombuds office, the size of the company, and the type of business in which the company is engaged, there are certain basic elements that are common to all ombuds offices. These are each discussed below.

First and foremost, an ombuds office must remain neutral throughout the process. In keeping with this, an ombuds must be independent from management. As such, an ombuds has no power to make policy within an

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[83] *See id.* at 97–98.

[84] *See* Isadore Silver, *The Corporate Ombudsman*, HARV. BUS. REV., May–June 1967, at 77–78.

[85] *See* David R. Anderson & Diane M. Stockton, Administrative Conference of the United States, *Recommendation 90-2: The Ombudsman in Federal Agencies: The Theory and the Practice*, *in* RECOMMENDATIONS AND REPORTS 1990, at 105, 190 (1990). For a discussion of ombuds programs in federal agencies, see D. Leah Meltzer, *The Federal Workplace Ombuds*, 13 OHIO ST. J. ON DISP. RESOL. 549 (1998).

[86] The Ombudsman Association, a professional organization dedicated to the practice of ombudsmandry, was founded in 1982.

[87] *See* Joanne Gross, *An Introduction to Alternative Dispute Resolution*, 34 ALTA. L. REV. 1, 30 n.86 (1995) (citing Rowe, *supra* note 80, at 138–139).

[88] Although this Note is limited to dealing with employees and supervisors within an organization, an ombuds office may deal with external customer or client concerns. *See* Mary P. Rowe, *Options, Functions, and Skills: What an Organizational Ombudsman Might Want to Know*, 11 NEGOTIATION J. 103, 104, 109 (1995).

organization and may only recommend policy changes in the interest of fairness and justice.[89]

Because neutrality is so essential to an ombuds's role, many critics question the integrity of a corporate-sponsored ombuds office. In discussing the role of ombuds officers in a university setting, one scholar notes, "if an ombudsperson serves at the whim of administrators, with little job security, he or she may be tempted to forego well-deserved criticism of administrative action."[90] Certainly, corporate-paid ombuds cannot escape this same criticism. However, corporations that recognize the benefits of the ombuds role should encourage and ensure neutrality.[91]

The second essential element of an ombuds role is that of confidentiality. The confidential nature of the ombuds office encourages

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[89] *See* Mary P. Rowe, *The Ombudsman's Role in a Dispute Resolution System*, 7 NEGOTIATION J. 353, 353-354 (1991).

[90] Wiegand, *supra* note 82, at 120.

[91] The significance of neutrality is evidenced by the fact that the Corporate Ombudsman Association (now the Ombudsman Association) has adopted a Code of Ethics that reflects this requirement of neutrality. *See* CORPORATE OMBUDSMAN ASSOCIATION, THE CORPORATE OMBUDSMAN'S HANDBOOK 15 (1986), *discussed in* Brenda V. Thompson, Comment, *Corporate Ombudsmen and Privileged Communications: Should Employee Communications to Corporate Ombudsmen Be Entitled to Privilege?*, 61 U. CIN. L. REV. 653, 658 (1992). This Code states:

> I. The Ombudsman, as a designated neutral, has the responsibility of maintaining strict confidentiality concerning matters that are brought to his or her attention. The only exception, at the sole discretion of the ombudsman, is in the instance of threat to the physical safety of others and/or threat to company assets. This duty to warn, however, shall be initiated only after the ombudsman has strongly counseled with the client involved to encourage the client to personally come forth. In the event the client still refuses, the ombudsman has an obligation to notify the client of the intended breach of confidentiality in this situation. Even then, the ombudsman has the responsibility and obligation to discuss the situation only with those who have a need to know.
>
> II. The ombudsman has the responsibility to insure that any records or files pertaining to confidential discussions with clients are safe from inspection at all times by other employees, including management at all levels.
>
> III. The ombudsman has the responsibility, when recommending actions as a result of impartial investigation, to make recommendations that will be equitable to all parties and reflect good business practice.
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> IV. The ombudsman has the responsibility to behave in a professional manner at all times, to maintain the credibility of the ombudsman function.

Thompson, *supra*, at 658 n.43 (quoting CORPORATE OMBUDSMAN ASSOCIATION, *supra*, at 15-16).

employees to seek out the assistance of the ombuds office.[92] In fact, many employees will only come forward, in certain instances, if confidentiality is guaranteed.[93]

Confidentiality can be somewhat problematic for an ombuds office. Although internal confidentiality can easily be assured, instances may arise where an employee brings a lawsuit and attempts to have the court compel release of confidential communications between herself or another employee and the ombuds office.[94] Unfortunately, corporate ombuds offices do not enjoy a privilege of confidentiality created by statute.[95] However, as *Kientzy v. McDonnell Douglas Corp.* illustrates, some courts are willing to recognize a privilege for ombuds offices in corporations.[96]

In *Kientzy* a former employee filed a lawsuit against McDonnell Douglas in federal district court alleging sex discrimination.[97] In gathering evidence for the lawsuit, the plaintiff sought to depose the corporate ombuds officer with whom she had met after being told that she was going to be terminated.[98] The ombuds officer filed a motion for an order

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[92] *See* Thompson, *supra* note 91, at 654.

[93] *See* Mary Elizabeth McGarry, *The Ombudsman Privilege: Keeping Harassment Complaints Confidential*, 214 N.Y.L.J. 104 (1995) (stating that according to Dr. Freada Klein of Klein Associates, a Boston consulting firm, "[66%] of harassment victims will not use formal complaint channels due to fear of reprisal and fear of breach of confidentiality. Complaint channels that promise confidentiality experience utilization rates twice that of non-confidential, formal channels.").

[94] For examples of situations where this has occurred see *Monoranjan Roy v. United Techs. Corp.*, Civil Cause No. H89-680 (JAC), slip op. (D. Conn. 1990) (determining that the plaintiff who consulted a corporate ombuds could not depose the ombuds to discover confidential information in his suit for age, race, and national origin discrimination), *discussed in Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570, 572–573 (E.D. Mo. 1991); *Kientzy*, 133 F.R.D. 570 (upholding confidential communications of ombuds and plaintiff who alleged termination based on gender and sought to depose the ombuds officer). *See also* Kevin L. Wibbenmeyer, *Privileged Communication Extended to the Corporate Ombudsman-Employee Relationship Via the Federal Rule of Evidence 501*, 1991 J. DISP. RESOL. 367.

[95] Such a privilege does exist for some public ombuds offices. For example, an Alaska statute created an ombuds office to investigate complaints made about the State's administrative agencies and also codified a privilege to protect the office from testifying. *See* ALASKA STAT. § 24.55.260 (Michie 1996).

[96] *See Kientzy*, 133 F.R.D. at 571.

[97] *See id.*

[98] *See id.*

protecting their communications from pretrial discovery under Federal Rule of Civil Procedure 26(c)(1).[99]

In coming to the conclusion that the confidential communications of the ombuds office were protected by Federal Rule of Evidence 501, and thereby granting the ombuds officer's motion to protect the communications from discovery, the court applied four factors that were necessary to its finding.[100] These four factors are as follows: (1) the communication must have been made with the expectation of confidentiality, (2) confidentiality must have been essential to the relationship between the parties, (3) the relationship must be one valued by society and worthy of protection, and (4) the injury of the relationship as a result of disclosure must be greater than the benefit that would be gained by proceeding in the ordinary course of litigation.[101] The only federal appellate court to have considered the issue held in *Carman v. McDonnell Douglas Corp.*[102] that Federal Rule of Evidence 501 does not provide a blanket privilege for corporate ombuds.[103] While the judicial privilege that was recognized by *Kientzy* does appear to be limited, some courts have applied the court's rationale from *Kientzy* without restricting its scope.[104] In fact, one California state court upheld the ombuds privilege by recognizing constitutional protection of the privacy interests of participants in an ombuds program.[105]

In addition to these two essential elements, all ombuds programs are similar in the fact that they are agents for change.[106] Furthermore, they empower employees, subordinates, and supervisors alike to explore a variety of options for resolving their problems with each other and the organization.[107]

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[99] *See id.*

[100] *See id.*

[101] *See id.*

[102] 114 F.3d 790 (8th Cir. 1997).

[103] *See id.* at 794–795. For an analysis of the court's decision in *Carman* see Corie Marty, Recent Development, 13 OHIO ST. J. ON DISP. RESOL. 275 (1997).

[104] *See, e.g.*, Acord v. Alyeska Pipeline Serv. Co., U.S. Dep't of Labor Case No. 95-TSC-4 (Oct. 4, 1995), *discussed in* Andrea McGrath, *The Corporate Ombuds Office: An ADR Tool No Company Should Be Without*, 18 HAMLINE J. PUB. L. & POL'Y 452, 466 n.73 (1997); Garstang v. Superior Ct. of Los Angeles County, 46 Cal. Rptr. 2d 84 (Cal. Ct. App. 1995).

[105] *See Garstang*, 46 Cal. Rptr. 2d at 89.

[106] *See* Rowe, *supra* note 88, at 110 (indicating that surveys by the Ombudsman Association indicate that approximately one-third of an ombuds's time is spent on systems change).

[107] *See* Rowe, *supra* note 89, at 356–359.

Establishing an ombuds program requires that the essential elements, confidentiality and neutrality, be maintained by the office and the organization. In order to ensure this, selecting the ombuds officer is a critical decision. Because the ombuds role is one that emphasizes personal relations and good communications skills, some commentators believe that personality traits are more important than specific credentials in selecting an ombuds.[108] Some of the traits that ombuds professionals themselves have identified as particularly valuable for performing their jobs include self-confidence, integrity, compassion, and excellent listening skills.[109]

Once an ombuds office is established and staffed, all members of the corporation should have access to the office to file complaints.[110] The ombuds officer then has the power to investigate, to issue reports about the complaints, and to make recommendations for resolving the problems presented.[111]

IV. THE OMBUDS PROGRAM AS PREVENTION

Ombuds officers have no power to make decisions, to make management act, or to reverse official action.[112] The role of the ombuds office is to seek resolution through investigation, conciliation, and persuasion.[113] As a tool for preventing workplace violence, the ombuds office would act in a capacity similar to the manner in which it handles all other employee concerns and grievances.

The most important function of the ombuds office in preventing workplace violence is dealing with conflict.[114] The obvious and inevitable result of unresolved conflict is violence.[115] Unfortunately, as one scholar

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[108] *See* Lee P. Robbins & William B. Deane, *The Corporate Ombuds: A New Approach to Conflict Management*, 2 NEGOTIATION J. 195, 203 (1986).

[109] *See id.* at 202–203.

[110] *See* Wiegand, *supra* note 82, at 134.

[111] *See id.*

[112] *See* AMERICAN ARBITRATION ASSOCIATION, OMBUDSERVICE™: A DISPUTE AVOIDANCE AND RESOLUTION SERVICE OF THE AMERICAN ARBITRATION ASSOCIATION, *available in* 1993 WL 833607, at *1 (1993) [hereinafter OMBUDSERVICE™].

[113] *See* Wiegand, *supra* note 82, at 136.

[114] *See generally* Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 13 ("Sociologist Vilhelm Aubert defines conflict as 'a state existing between two (or more) individuals characterized by some overt signs of antagonism.'") (quoting Vilhelm Aubert, *Competition and Dissensus: Two Types of Conflict and of Conflict Resolution*, 7 CONFLICT RESOL. 26 (1963)).

[115] *See id.* at 14.

notes, "[w]hen unappeased, violence seeks and always finds a surrogate victim. The creature that excited its fury is abruptly replaced by another, chosen only because it is vulnerable and close at hand."[116] As a result, violence in the workplace often claims many victims.[117] However, by targeting conflict (the root of violence) addressing it and taking steps to eliminate it, an ombuds program can prevent violence.

An ombuds office has the opportunity to address conflict in a number of ways. First and foremost is that an ombuds office offers employees and supervisors a place to be heard.[118] Not only is it a place to be heard, but it is also ideally a neutral space where confidentiality is assured.[119] For many disgruntled employees, the opportunity to be heard is enough. For others, more may be needed.

If an employee needs more than just a discreet, neutral listener, an ombuds office provides employees with a means of filing grievances.[120] Employees can file grievances anonymously, if they choose. This eliminates the risk that many employees feel that they take when they complain to management, particularly their immediate supervisors.[121]

An ombuds office may also serve to offer suggestions and solutions to employees looking for advice or guidance in dealing with difficult situations.[122] For example, in situations in which coworkers are at odds over a misunderstanding or mutual disrespect, an ombuds may suggest that

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[116] *Id.* at 14–15 (quoting RENE GIRARD, VIOLENCE AND THE SACRED 2 (1977)).

[117] *See id.* at 15.

[118] *See* OMBUDSERVICE™, *supra* note 112, at *1. This article, in addition to discussing the general nature of an ombuds program, announces OMBUDSERVICE™, a service of the American Arbitration Association to provide help to existing ombuds offices and smaller organizations.

[119] *See supra* notes 92–105 and accompanying text.

[120] Such corporations as Chevron, Eastman Kodak, and Pharmacia & Upjohn employ ombuds officers. These companies report that their ombuds officers handle discrimination complaints, whistle-blower reports, and sexual harassment grievances. *See* Mike France, *Now, the Dirty Laundry Gets Washed in Public*, BUS. WK., Oct. 27, 1997, at 150.

[121] Some corporations have designated the ombuds office specifically for the purpose of filing complaints against the corporation, be they ethical, moral, or legal in nature. *See* Victor Futter, *It's Time for a Corporate Ombudsperson*, 10 ALTERNATIVES TO HIGH COST LITIG. 76, 76 (1992).

[122] Texaco recently announced plans to establish a corporate ombuds program. Texaco stated in a press release that the program would be a "resource within the company to provide confidential assistance in resolving work-related concerns by serving as a counselor and facilitator." *Carole A. Young Named Corporate Ombuds Director* (visited Oct. 27, 1998) <http://www.texaco.com/compinfo/busnew.htm>.

the two employees agree to mediation. Another way in which an ombuds officer may deflect violence is by suggesting that employees take legal action against family members or coworkers who have "wronged" them in some way instead of turning to methods of self-help that may lead to violence.

Another situation in which an ombuds office may be valuable at preventing workplace violence is in diffusing difficult management-employee relationships. An ombuds officer, as a neutral and discrete party who is not directly involved in the employee's work situation, may be able to offer advice or assistance to an employee who feels that they have been reprimanded or disciplined unfairly. Likewise, an ombuds officer could potentially act as a go-between for supervisors and employees to help each side better understand the other's position.

Finally, an ombuds officer may be able to counsel employees who are having particularly stressful times at work or in their home life and diffuse potential episodes of erratic or aggressive behavior that may lead to violence in the workplace.[123] Although an ombuds officer may not have the necessary skills to act as a counselor in this capacity, the officer's role as a trusted neutral confidant may pave the way for the officer to act as a referral for those in need of professional counseling.

V. CONCLUSION

Violence in the workplace is a growing trend that is not likely to dissipate on its own. Workplace violence carries with it incredible costs to employers through lost productivity and legal liability that arises from subsequent litigation brought by the victims of the violence. Employers must take a proactive stance to prevent workplace violence and limit their liability. Establishing a corporate ombuds program is one means by which employers can eliminate the conflict that arises in the workplace and leads to violence. Although it is not a perfect solution that will end all occurrences of violence in the workplace, an ombuds office certainly can be one significant contribution toward a healthier, safer work environment.

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[123] The Boston law firm of Palmer & Dodge established an ombuds office in 1991, primarily to deal with issues of sexual harassment. According to Elizabeth Walsh Pino, the firm's ombuds, "[w]ith the demographics of today's workplace, you are going to have misunderstandings and miscommunications . . . . The role of an ombudsman is to help sort things out early on." Cindy Collins, *Boston's Palmer & Dodge Embraces Ombudsman*, LAW. HIRING & TRAINING REP., Apr. 1994, at 12, *available in* WESTLAW, LWH Database.